

March 24, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alliance for Nuclear Accountability

Date of Filing: December 30, 2002

Case Number: TFA-0013

On December 30, 2002, the Government Accountability Project on behalf of the Alliance for Nuclear Accountability (Alliance) filed an Appeal from a determination issued to it on November 21, 2002, by the FOIA and Privacy Act Division (FOIA Division) of the Department of Energy (DOE). That determination concerned a request for information that Alliance submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the information withheld and to search for additional responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Alliance filed a FOIA request seeking “all documents produced as part of the ‘top-to-bottom assessment of the Environmental Management program’ initiated by Secretary Spencer Abraham as detailed in a memorandum dated May 14, 2001.” *See* Appeal Letter at 1. On April 30, 2002, the FOIA Division issued a determination which stated that it conducted a search for responsive documents in the files of the Office of Environmental Management (EM) and identified various responsive documents, which were provided in an enclosed listing to Alliance. The FOIA Division provided Alliance with these responsive documents in their entirety. In addition, in its April 30, 2002 determination, the FOIA Division stated that it had located eight additional responsive documents, but that these documents were being reviewed by DOE to determine their releasability. The FOIA Division further stated that it would provide a response to Alliance when this review was completed.

On November 21, 2002, the FOIA Division issued a second determination, which stated that it had completed a review of the eight additional responsive documents and determined that they contain

information that is protected from disclosure under Exemption 5 of the FOIA. The FOIA Division provided these documents to Alliance with deletions. It stated that the withheld material is "pre-decisional" and "deliberative." See November 21, 2002 Determination Letter at 1.

On December 30, 2002, Alliance filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Alliance challenges the FOIA Division's determination, and asserts that material was improperly withheld under Exemption 5 and that DOE failed to perform an adequate search. See Appeal Letter at 3-5. For these reasons, Alliance requests that OHA direct the FOIA Division to release the requested information.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In withholding portions of documents from Alliance, the FOIA Division relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)) (*Mink*). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id.*

After reviewing the requested documents at issue, we have concluded that the determination made by the FOIA Division in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Alliance consists of comments, recommendations and opinions prepared by DOE employees and intended only for internal DOE use. The information requested in this case properly falls within the definition of "intra-agency memoranda" in the FOIA.

In addition, the comments, recommendations and opinions contained in the documents are clearly predecisional and deliberative. They were created by a subordinate of the Assistant Secretary of Environmental Management for consideration and do not represent a final agency position. Accordingly, we hold that the comments, recommendations and opinions withheld from the memorandum meet all the requirements for withholding material under the Exemption 5 deliberative process privilege. ^{*/}

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Adequacy of Search

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler*,

^{*/} Alliance also asserts that the FOIA Division failed to include an adequate Vaughn index in its Determination Letter. *See* Appeal at 2. A Vaughn index is recognized in the context of FOIA as an index identifying each responsive document, the exemption under which it is being withheld and an explanation why that exemption is applicable, or in the alternative a similar document describing each withholding. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. *See, e.g., Missouri River Energy Services*, 27 DOE ¶ 80,165 (1998). At the administrative levels, agency determinations to deny release of documents need only provide a general description of the withheld material and a statement of the reason for withholding each document. The FOIA Division's Determination Letter provides a general description for withholding portions of documents pursuant to Exemption 5. It permits the appellant to formulate the basis for its appeal, and permits the appellate authority to understand the FOIA Division's assertion of the exemption. Therefore, we reject Alliance's request for a complete Vaughn Index.

Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995).

In the present case, Alliance asserts that “one document produced by DOE indicates that Idaho National Environmental and Engineering Laboratory (INEEL) staff contributed significantly to the Top-to-Bottom Review (TTBR) process, yet no additional documents were produced that pertain to the INEEL.” Appeal at 5. Alliance further argues that “given the reference to INEEL in responsive documents, the fact that the INEEL is a major nuclear weapons and environment management site, and coupled with the fact the DOE also failed to produce any documents pertaining to the Paducah site - GAP and ANA assert that DOE has failed to perform an adequate search.” *Id.* In response to Alliance’s Appeal, we contacted the FOIA Division to determine the scope of the search. The FOIA Division referred us to an official in EM because EM conducted the initial search and is the office most likely to contain responsive material. *See* Record of Telephone Conversation Between Bill Levitan, EM and Kimberly Jenkins-Chapman, OHA (March 7, 2003). That official informed us that it conducted a search of EM’s files and provided all the responsive documents that were located. EM informed us that the documents provided to Alliance were almost all briefing packages, including a briefing package produced by INEEL. It further asserts that INEEL staff were not part of the TTBR team, but mainly gave tours of the site. EM maintains that it located no additional responsive documents that pertain to INEEL. In addition, EM states that there were no documents located from Paducah because the TTBR team did not visit that site as part of their review.

Given the facts presented to us, we find that the FOIA Division and EM conducted an adequate search which was reasonably calculated to uncover documents responsive to Alliance’s request. Accordingly, Alliance’s Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Alliance for Nuclear Accountability, OHA Case No. TFA-0013, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 24, 2003